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**DEPARTMENT OF
WATER RESOURCES**

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**BEFORE THE DIRECTOR
OF THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE REQUEST FOR)
ADMINISTRATION IN WATER DISTRICT 120)
AND THE REQUEST FOR DELIVERY OF WATER)
TO SENIOR SURFACE WATER RIGHTS BY)
A&B IRRIGATION DISTRICT,)
AMERICAN FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
_____)

**POCATELLO'S RESPONSE
TO SWC'S MOTION FOR
CLARIFICATION AND
SUPPLEMENTAL
INFORMATION
CONCERNING RECORD**

SUMMARY

The City of Pocatello, by and through its undersigned attorneys, submits its response to the Surface Water Coalition's Motion for Clarification and Supplemental Information Concerning Record (SWC Motion). Based upon Pocatello's understanding of the SWC Motion, Pocatello supports the Motion. Principles of due process require that the Department provide all

materials relied upon by the Department in entry of its Orders in this matter, that such materials be provided in a timely fashion, and that the Parties have meaningful opportunity to include (or rebut) the information used by the Department in their own analyses.

Further, the Department should make knowledgeable persons available for deposition regarding the uses made by the Department of the materials relied upon. Finally, the Department should include in the Record of Decision *all* materials provided by the Parties or previously relied upon and disclosed by the Department.

REQUEST FOR CLARIFICATION AND ACTION BY THE DEPARTMENT

It appears that the SWC Motion seeks to clarify three things:¹

1. Whether all the materials, memoranda, and other evidence relied upon by the Department in entering its May 2, 2005 Order and the July 22, 2005 Supplemental Order² have been disclosed to the parties to this matter through the Department's Record of Decision?
2. Whether the Department's May 2, 2005 Order and July 22, 2005 Supplemental Order were based upon any facts or other information of which the Department took official notice under Procedure Rule 602? And if so, what were the "officially noticed" items the Department relied upon?
3. Whether and how these earlier relied-upon materials will be made part of the Department's record in this formal proceeding?

Pocatello urges the Department to answer the first question as soon as possible. If there are other documents, or tangible items relied upon in the May 2 Order and the July 22 Supplemental Order that have yet to be provided, then the parties should be apprised of that as soon as possible and such documents and tangible items be made available on or before September 2, 2005.

¹ To the extent this is *not* what SWC sought to clarify, Pocatello makes its own request for clarification on these three matters and would ask that these issues be clarified along with any distinct issues raised by the SWC Motion.

² Reference to the May 2, 2005 and July 22, 2005 Orders includes all associated interlocutory orders, such as the orders on replacement water plans.

The Department should also indicate whether the Department took “official notice” of any materials for either its May 2 or July 22 Order, and if so, the source of those materials, and how the materials were utilized. The most efficient means for the Department to provide this information is to make a responsible staff member available for deposition about the analyses and investigations conducted and materials relied upon in the Department’s Orders.³

On the third issue, based on principles of administrative law and the Department’s Rules of Procedure, the Department should take the position that *all* materials and information previously relied upon, *as well as* whatever evidence the parties introduce during the course of the hearing, and matters of which the Director takes official notice should form the record of decision in this matter. Procedure Rule 650. Any other course of action introduces the possibility that legal error will attach to the final decision in this matter.


In summary, Pocatello requests that the Department:



1. By September 2, 2005, provide any remaining documents or other tangible items relied upon in the entry of the May 2 and July 22, 2005 Orders in this matter;
2. Also by September 2, 2005, identify a person or persons who are knowledgeable and may be deposed regarding the use of such materials with respect to the Department’s May 2 and July 22, 2005 Orders.
3. Rule that all materials and information previously relied upon by the Department in reaching the May 2 and July 22, 2005 Orders, together with evidence the parties introduce during the course of the hearing in this matter, and additional materials that the Director advises the parties before the hearing that he will officially notice⁴, shall form the record of decision.

³ This request is also made by Pocatello and IGWA in their Joint Written Request for Depositions filed contemporaneously with this Response.

⁴ This does not limit the requirement that any Department Notice that official notice will be taken for the hearing presently scheduled to begin January 30, 2006 must include all specific facts and material to be noticed (even if duplicative of facts or material relied upon for the May 2 and July 22 Orders).

Respectfully submitted this 23rd day of August 2005.


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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August 2005, I caused to be served a true and correct copy of the foregoing document by regular U.S. Mail, postage prepaid, to:

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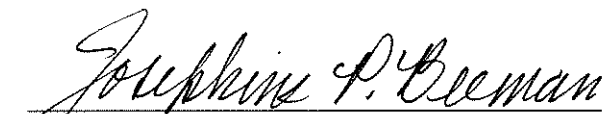
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